Bank Bumiputra Malaysia Bhd & Ors v Kimlin Housing Development Sdn Bhd (in receivership)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D3–31–195–88
VC GEORGE J
15 JANUARY 1993

Companies and Corporations *— Receivership — Power of receivers and managers to sell property — Company created charges over its land under National Land Code 1965 — Receivers and managers appointed by debenture holder — Whether receivers and managers could sell the land without resorting to the procedure in the National Land Code 1965 — National Land Code 1965*

Kimlin Housing Development Sdn Bhd ('the company') created two National Land Code charges over its lands ('the said lands'), in favour of the first plaintiff bank ('the bank') to secure certain banking facilities. On 29 June 1985, the company executed a deed of debenture ('the debenture') in favour of the bank also to secure banking facilities. The debenture created a first floating charge over, inter alia, the company's movable and immovable properties. The company has since gone into liquidation.The second, third and fourth plaintiffs were appointed receivers and managers of the company pursuant to the provisions of the debenture. They sought to rely on s 8.04 of the debenture to sell the said lands of the company which were covered by the two National Land Code charges and the debenture. Section 8.04 of the debenture provided, inter alia, that the receivers and managers have power to sell any of the assets or properties of the company. The receivers and managers applied for leave of the court to sell the said lands. This application was opposed by the liquidator of the company. The only issue that needed to be adjudicated upon was whether the receivers and managers had the right and power to sell the said lands without resorting to the procedure for sale of lands as prescribed by the National Land Code 1965.

Held, allowing the application:

(1) Where there is a debenture which gives power to the receivers and managers to, inter alia, sell the said lands at such price as they in their absolute discretion shall think fit and which gives power to the receivers and managers to do all such reasonable acts and things which they may lawfully do as agents of the company, the receivers and managers are entitled to do any and all things and matters that the debenture empowers them to do.

(2) Due to the existence of the charge, the receivers and managers should be entitled to sell the said charged lands and have the title to the said lands transferred with the consent of the chargee.

Per curiam:

The fact that the company has been put into liquidation does not affect a secured creditor and does not affect the securities held by them, not until the secured creditor has been fully paid off. The secured creditor can dispose of the securities in spite of the liquidation.

[Bahasa Malaysia summary

Kimlin Housing Development Sdn Bhd ('syarikat itu') telah mewujudkan dua gadaian di bawah Kanun Tanah Negara 1965 ke atas tanah-tanahnya ('tanah itu'), memihak kepada plaintif pertama ('bank itu') sebagai cagaran untuk kemudahan perbankan yang tertentu. Pada 29 Jun 1985, syarikat itu telah menyempurnakan suatu suratikatan debentur ('debentur itu') memihak kepada bank itu juga sebagai cagaran untuk kemudahan perbankan. Debentur itu telah mewujudkan suatu gadaian terapung yang pertama ke atas, antara lain, harta-harta alih dan tidak alih kepunyaan syarikat itu. Syarikat itu telah dilikuidasikan. Plaintif-plaintif kedua, ketiga dan keempat telah dilantik sebagai penerima dan pengurus syarikat itu mengikut peruntukkan debentur itu. Mereka ingin bersandar pada s 8.04 debentur itu untuk menjual tanah-tanah kepunyaan syarikat itu yang dilingkungi kedua-dua gadaian di bawah Kanun Tanah Negara 1965 serta debentur itu. Seksyen 8.04 debentur itu memperuntukkan, antara lain, bahawa penerima dan pengurus mempunyai kuasa untuk menjual sebarang aset atau harta kepunyaan syarikat itu. Penerima dan pengurus telah memohon kebenaran mahkamah untuk menjual tanah itu. Permohonan ini telah ditentangi oleh penyelesai syarikat itu. Satu-satunya isu yang perlu diputuskan adalah sama ada penerima dan pengurus itu mempunyai hak dan kuasa untuk menjual tanah itu tanpa bergantung kepada prosedur untuk penjualan tanah seperti yang diperuntukkan oleh Kanun Tanah Negara 1965.

Diputuskan, membenarkan permohonan itu:

(1) Di mana terdapat suatu debentur yang memberi kuasa kepada penerima dan pengurus itu untuk, antara lain, menjual tanah itu pada harga yang difikirkan sesuai di dalam budibicara mutlak mereka serta memberi kuasa kepada penerima dan pengurus itu untuk membuat segala tindakan dan perkara yang munasabah yang boleh dilakukan oleh mereka secara sahnya sebagai ejen syarikat itu, penerima dan pengurus berhak membuat apa-apa dan kesemua perkara yang debentur itu memberi kuasa kepada mereka untuk membuat.

(2) Di sebabkan kewujudan gadaian itu, penerima dan pengurus itu berhak menjual tanah yang tergadai itu serta untuk meminda hakmilik tanah-tanah tersebut dengan kebenaran pemegang gadaian.

Per curiam:

Walaupun syarikat itu sedang berada di dalam penyelesaian, ini tidak akan menjejaskan seseorang pemiutang bercagar dan cagaran yang dipegang oleh mereka, sekurang-kurangnya tidak sehingga segala hutang yang terhutang kepada pemiutang bercagar itu dijelaskan dengan sepenuhnya.]

[*Editorial Note*: The respondent company has appealed to the Supreme court vide Civil Appeal No 02–100–93.]

Notes

For cases on receivership of companies, see 3 *Mallal's Digest* (4th Ed) paras 139–148.

Cases referred to

1 *United Malayan Banking Corp Bhd v Official Receiver and Liquidator of Soon Hup Seng Sdn Bhd (in Liquidation) & Anor* [1986] 1 MLJ 75 (folld)
2 *Re Sama Corp Sdn Bhd; CI Holdings Bhd v Jabatan Pemegang Harta* [1992] 2 MLJ 251 (refd)

Legislation referred to

National Land Code 1965

Wong Chong Wah (*Skrine & Co*) for the plaintiffs.
Paul Ong Teng Kek (*Paul Ong & Associates*) for the defendants.

Cur Adv Vult

VC George J: Kimlin Housing Development Sdn Bhd ('the company') who owned certain lands created Natlonal Land Code charges in respect of them in favour of the first plaintiff bank ('the bank') to secure certain banking facilities in September 1980. Subsequently in respect of certain of those lands a second legal charge (also under the National Land Code 1965) was created in January 1985 (registered on 30 June 1985) also in favour of the bank.

On 29 June 1985, Kimlin duly executed a deed of debenture in favour of the bank also to secure the banking facilities. The company has since gone into liquidation.

By the said debenture, the company created a first fixed charge over all its plant, equipment, machineries and motor vehicles with its accessories and parts pertaining thereof and a first floating charge over, inter alia, all its undertakings, properties and assets, both movable and immovable in favour of the bank to secure the repayment of all moneys due and owing to the bank. The said debenture was duly registered pursuant to s 108 of the Companies Act 1965.

The provisions of the said debenture in so far as they are relevant to the proceedings herein are as follows:

(i) at any time after the moneys thereby secured shall have become repayable:

  (a) the bank or any authorized person may enter into and upon any land or premises where the properties or assets of the company thereby charged are and may take possession and control thereof (s 8.03); and
  (b) the bank may appoint any persons to be the receivers and managers of the properties thereby charged to it (s 8.03(c));

(ii) the receivers and managers appointed by the bank shall have power, inter alia:

  (a) to take possession of or collect and get in all the properties or assets charged under the said debenture;
  (b) to carry on, manage or concur in carrying on or managing the company's business;
  (c) to sell or concur in selling any of the assets or properties of the company thereby charged at such price as they in their absolute discretion shall think fit, having regard to the views and desires of the banks; and
  (d) to do all such other reasonable acts and things as may be considered to be incidental or conducive to any of the matters or powers

contained in the said debenture and which the receivers and managers may lawfully do as agents of the company (s 8.04);

(iii) the bank may at any time after the moneys thereby secured shall have become payable effect the sale of any of the properties of which it takes possession and the company shall do all things necessary to enable the bank to complete any such sale (s 10.07).

The second, third and fourth plaintiffs were duly, pursuant to provisions in the deed of debenture, appointed receivers and managers of the company. They seek to invoke s 8.04 of the debenture and desire to sell certain lands which are covered by the debenture and which are also charged to the bank under the National Land Code 1965. The receivers and managers say that because there is no express appointment of the receivers and managers as attorneys of the company they thought that they should obtain leave of the court to sell the lands.

The application is opposed by the liquidator of the company.

Counsel have agreed that the only issue that needs to be adjudicated upon is whether the receivers and managers have the right and power to sell the lands without resorting to the procedures for sale of lands charged as prescribed by the National Land Code 1965.

Shankar J at p 791 in *United Malayan Banking Corp Bhd v Official Assignee and Liquidator of Soon Hup Seng Sdn Bhd (in Liquidation) & Anor*[1] where the facts were somewhat similar to the position obtaining in the instant case, was of the view that the receivers and managers need not use the National Land Code procedures.

For the defendants that case was sought to be distinguished on the ground that there the receivers and managers were expressly given a power of attorney. I do not see the distinction. A power of attorney gives power. So can and, in this case, does the debenture. Where the debenture gives clear powers of sale there is no need for a further power of attorney giving the same power. In any event, in fact the power of attorney given in the *UMBC* case[1] had not been validated. Shankar J said at p 82 of the report:

> But as the power of attorney in this case has not yet been validated what has to be done? The bank and/or the receiver, in my view, stlll has the power to sell, but it is with regard to the mechanics of the transfer of title that the aid of the court has to be sought.

In respect of the mechanics the learned judge went on (at p 82) to say:

> Here the bank has the issue document of title and all that is required to consummate the sale is a valid registrable transfer of the property. In the clrcumstances of this case this objective can be easily achieved by making an order that the bank and/or the receiver be entitled to require the registrar of this court to execute on behalf of the company any transfer which the bank and/or the receiver may present subject to the name of the transferee and the consideration for the sale being duly stated therein. A further order can, if need be, be made directing the Registrar of Titles — to registar the transfer in favour of the purchaser. In other words the same procedure would be followed as if the sale had been conducted by the court.

In a more recent judgment delivered on 13 September 1991 [*Re Sama Corp Sdn Bhd; CI Holdings Bhd v Jabatan Pemegang Harta*[2]], Zakaria Yatim J took the view that where there is a National Land Code charge and a debenture,

it is for the chargee and not for the receivers and managers to apply for an order of sale of the land. The *UMBC* judgment[1] does not appear to have been referred to by Zakaria Yatim J. A

It seems to me that a relevant question that has to be considered is whether, assuming that there was no debenture that affects the land but there is a National Land Code charge on it, could the owner sell and transfer the land to a third party? The answer is yes, but only with the consent of the chargee which will normally be given on the chargee being satisfied that the amounts needed to redeem the property will come to hand. Where there is a debenture (as is the situation in the instant case) which gives power to the receivers and managers to, inter alia, sell the properties of the land 'at such price as they in their absolute discretion shall thlnk fit ...' and which gives power to the receivers and managers 'to do all such reasonable acts and things (which they) may lawfully do as agents of the company (ie Kimlin Housing Development Sdn Bhd)', the receivers and managers are entitled to do any and all things and matters that the debenture empowers them to do. Since there is the express power to sell, if the registered owner ie thc company, is entitled to sell, the receivers and managers are equally entitled to sell. Because of the existence of the charge the receivers and managers should be entitled to sell the charged lands and have title to the lands transferred with the consent of the chargee which, in this case, happens to be the debenture holder first named plaintiff. B C D

Now, that the company has been put into liquidation does not affect a secured creditor and does not affect the securities held by them, not until the secured creditor has been fully paid off. E

In my judgment, the secured creditor can dispose of the securities in spite of the liquidation. The receivers and managers are entitled to do what the contract (that the debenture is) entitles them to do. They are not obliged to utilize the land code sale of land procedures. I need hardly add that the receivers and managers will be expected to realize the best price they can get for the properties to be sold. Contractually the receivers and managers are entitled to their reasonable expenses and the costs of this application clearly should be treated as such reasonable expenses. I also need hardly add that any balance after the receivers and managers have paid off the bank and after the reasonable expenses and fees of the receivers and managers have been taken cared of should be handed over to the liquidators with an account. F G

There will be an order in terms of prayers (i) and (v) only of the application — encl (2). In the context of the substantial prayer in the application which is prayer (i), I fail to see the need for prayers (ii) and (iii). As to prayer (iv), I fail to see why I should interfere with the administrative duties of the Registrar of Titles. H

Application allowed.

Reported by Lim Chee Wee

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